



Third Party Appeals Under the NC APA

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History of NC APA

- Adopted in 1974, Effective February 1, 1976
- Established a uniform system of administrative rulemaking and adjudicatory procedures for State agencies
- Amended numerous times, but amendment of particular significance to third party appeals was made in 1991

Empire Power Co. v. DEHNR



Challenge to issuance of an Air Quality permit to Duke Power Company.

- Duke and DEHNR moved to dismiss based on lack of jurisdiction in the Office of Administrative Hearings
 - OAH denied
 - Petition for Writ of Certiorari to Wake County Superior Court
 - Superior Court dismissed petition and remanded to OAH
 - Appeal to NC Court of Appeals

APA Procedural Only?

- NC Court of Appeals held “third parties may not seek a contested case hearing under Section 143-215.108(e) to challenge issuance of an air quality permit. APA only describes the procedures for OAH review.
- Relied on previous decision in *Citizens for Clean Industry, Inc. v. Lofton*, construing 143-215.1(e) in a challenge to a wastewater discharge permit.
- Both statutes stated that “permit applicants or permittees” could challenge permit decision.
- 1991 amendment to APA:
 - Chapter 150B “confers procedural rights . . . [t]he contested case provisions of this Chapter apply to . . . all proceedings not expressly exempted”.

Person Aggrieved

- NC Supreme Court reversed, also relying on the 1991 amendment
- Disapproved cases relied upon by the Court of Appeals
- Organic statutes now include right to appeal by third parties
- The test for the right to seek contested case hearing is whether the petitioner is a “person aggrieved.”
- “Person aggrieved” means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.
- *Holly Ridge Associates LLC v. DENR* questions whether a third party can be person aggrieved with respect to the assessment of a civil penalty

Allegations for Petition

- Party shall state facts tending to establish that the agency named as the respondent has:
 - Deprived the petitioner of property
 - Ordered the petitioner to pay a fine or civil penalty
 - Other substantially prejudiced the petitioner's rights

150B-23 Showing

Petitioner must show that the agency

- Exceeded its authority or jurisdiction
- Acted erroneously
- Failed to use proper procedure
- Acted arbitrarily or capriciously
- Failed to act as required by law or rule

Carolinas Cement - Standing

Carolinas Cement Company LLC

NC Coastal Federation v. DENR

- ALJ found petitioners were persons aggrieved and had standing
- Respondents' motion for summary judgment was granted
 - No genuine issues of material fact regarding Petitioners' failure to show their rights were substantially prejudiced
 - Discovery conducted for over a year
- EPA inquiry into failure to provide opportunity for interested persons to challenge administrative decisions

Martin-Marietta - Standing

Martin-Marietta – Blounts Creek

Pamlico-Tar River Foundation v. DENR

- Summary judgment granted on basis of lack of standing
- DENR took no position
- ALJ: no evidence that petitioner's rights substantially prejudiced and no evidence that petitioner made the required showings in 150B-23
- ALJ: even if petitioners were persons aggrieved, summary judgment was appropriate
- Reversed and remanded to OAH

EPA Letter and DEQ Response

- October 2015 EPA letter to DEQ
 - Requested by environmental group to assist in litigation
 - Expressed concern about third party review of permits
- January 2016 DEQ letter to EPA explaining NC law
 - EPA lacked understanding of NC APA
 - NC provides broad access to judicial review
 - EPA judicial review procedures provide limited right of appeal to citizens
- Copy of DEQ letter
 - On the Department website
 - Provided as a handout to the Commission

